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No. 01 133

In The Supreme Court of the United States

JIMMY FITZGERALD,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a *Writ* of *Certiorari* to the Supreme Court of the Commonwealth of Virginia

PETITION FOR A *WRIT* OF *CERTIORARI*

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18 pp

QUESTIONS PRESENTED

I. WHETHER THE EVIDENCE WAS SUFFICIENT TO SUPPORT A CONVICTION OF THE DEFENDANT FOR THE OFFENSE OF DRIVING UNDER THE INFLUENCE?

II. THE COURT SHOULD CONSIDER THE ARGUMENT OF COUNSEL TO FULFILL
THE ENDS OF JUSTICE?

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OPINIONS BELOW

The opinion of the Virginia Supreme Court is the subject of this petition. The Supreme Court of Virginia upheld the opinion of the Virginia Court of Appeals. A copy of the opinion of both Courts is attached hereto as Appendix A and B. Also included are copies of the denial of the Petitioners request for a rehearing in both Courts.

JURISDICTION

This Petition for a Writ of Certiorari is filed within 90 days of the Petition for Rehearing to the Virginia Supreme Court. The Court's jurisdiction is invoked pursuant to Rule 10(b) of the Rules of the United States Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. XIV, section 1.

No State shall make or enforce any laws which shall abridge the privileges or immunities of the Citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The following statement of facts are agreed upon by both the Commonwealth of Virginia and the defendant, Jimmie Fitzgerald. The facts are as follows:

Officer T.W. Eanes was on routine patrol as a Danville Police Officer on February 20, 1999. Eanes observed the defendant operating a motor vehicle at the intersection of West

Main Street and Tunstall Road. Eanes testified that at the time he saw the defendant, he was assisting another officer at a traffic stop. Eanes observed the defendant's blue Chevrolet at 12:46 a.m. traveling on the roadway with no active headlights. Eanes immediately followed the vehicle and initiated a traffic stop at West Main Street and Howeland Circle, approximately 500 feet from the initial observation.

Eanes activated his blue lights and siren and stopped the defendant. The defendant was the operator of the blue Chevrolet and a female passenger was also present.

Upon speaking to the defendant, Officer Eanes noticed an odor of alcohol emanating from the defendant. The officer then asked the defendant to exit the vehicle and the defendant agreed to perform field sobriety tests. Before performing the tests, the defendant advised the officer that he was a high school graduate and knew his ABC's. When asked to recite his ABC's, the defendant recited each letter up to the letter "F" and stopped. The officer then demonstrated and requested the defendant to perform the "heel-to-toe" test. Eanes testified the defendant performed the test unsatisfactorily in that the initial 9 steps by the defendant were not heel to toe and that the defendant simply turned and walked back to the starting point rather than returning in a heel to toe fashion. Officer Eanes indicated that he demonstrated and requested the defendant to perform the finger to nose test. The defendant satisfactorily completed the finger to nose test.

The defendant was then arrested for driving under the influence of alcohol and read the Implied Consent Statute. The defendant agreed to take the breath test and was transported to the Danville Police Department. The observation period began

at 1:33 a.m. and the breath test was administered at 1:58 a.m. by Officer Jerry Pace. Officer Pace did not testify. The defendant had nothing to eat or drink during the observation period and did not belch, burp or put anything into his mouth.

The Attorney for the Commonwealth moved for the introduction of the breath certificate into evidence. Defense counsel objected to the introduction of the certificate on the grounds that Officer Eanes did not testify that a copy of the breath test certificate was provided to the defendant. The Court overruled the defendant's objection and accepted the certificate of analysis. The certificate of analysis showed a blood alcohol content of .14. The Court noted the exception of the defense to the Court's ruling.

The defendant presented no evidence. The defendant moved to strike the evidence presented by the Commonwealth, but this fact was not included in the Agreed Statement of Facts. However, the Commonwealth conceded in its brief to the Virginia Supreme Court that the defendant made the Motion to Strike the Evidence.

ARGUMENT FOR GRANTING THE WRIT

I. THE EVIDENCE WAS INSUFFICIENT TO CONVICT THE DEFENDANT FOR THE OFFENSE OF DRIVING UNDER THE INFLUENCE.

On appeal, the evidence is viewed in the light most favorable to the prevailing party, the Commonwealth, and the reasonable inferences fairly deducible from that evidence support each and every element of the charged offense. See **Moore v. Commonwealth**, 254 Va. 184, 491 S.E.2d 739 (1997); **Derr v. Commonwealth**, 242 Va. 413, 410 S.E.2d 662 (1991).

The facts presented at trial are inconsistent with guilt. The defendant was convicted by the trial court of driving under the influence. The defendant submitted to a breath test on the Intoxilyzer 5000 and the original breath test result was introduced into the evidence by the Commonwealth. The defendant objected on the grounds that although the original was introduced, there was no evidence that the copy of the original breath test result was provided to the defendant. To sustain a conviction, the Commonwealth must satisfy the requirements of Virginia Code Section 18.2-268.2(B). The stated code section reads:

> Any person so arrested for a violation of Sec. 18.2-266 (i) or (ii) or both, or Sec. 18.2-266.1 or of a similar ordinance shall submit to a breath test. If the breath test is unavailable or the person is physically unable to submit to the breath test, a blood test shall be given. The accused shall, prior to administration of the test, be advised by the person administering the test

> that he has the right to observe the process of analysis and to see the blood-alcohol reading on the equipment used to perform the breath test. **If the equipment automatically produces a written printout of the breath test result, the printout, or a copy, shall be given to the accused.** (Emphasis added)

"`Where a statute is unambiguous, the plain meaning is to be accepted without resort to the rules of statutory interpretation. '" ***Frazier v. Commonwealth, Dept. of Social Servs., Division of Child Support Enf'ment, ex rel. Susan M. Sandridge,*** 27 Va. App. 131, 134, 497 S.E.2d 879, 880 (1998) (quoting ***Last v. Virginia State Bd. of Med.***, 14 Va. App. 906, 910, 421 S.E.2d 201, 205 (1992)). "When analyzing a statute, we must assume that `the legislature chose, with care, the words it used when it enacted the relevant statute, and we are bound by those words as we interpret the statute. '" ***Frazier***, 27 Va. App. at 135, 497 S.E.2d at 881 (quoting ***City of Virginia Beach v. ESG Enters.,*** *Inc.*, 243 Va. 149, 153, 413 S.E.2d 642, 644 (1992) (citation omitted)). "`"Courts are not permitted to rewrite statutes. This is a legislative function. The manifest intention of the legislature, clearly disclosed by its language, must be applied." '" ***Frazier***, 27 Va. App. at 135, 497 S.E.2d at [Page 239] 881 (quoting ***Barr v. Town & Country Properties***, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990) (citation omitted)).

Officer Eanes arrested the defendant, but Officer J. L. Pace performed the breath test on the defendant as is indicated on the certificate introduced into the evidence. (SF-21) Officer Pace did not testify nor did Officer Eanes testify that the defendant received a copy of the breath test results. (SF 21-

23)

Accordingly, the Commonwealth did not comply with the statutory mandates of Virginia Code Section 18.2-268.2 and the breath test certificate and related evidence was improperly introduced into evidence.

II. THE COURT SHOULD CONSIDER THE ARGUMENT OF COUNSEL TO FULFILL THE ENDS OF JUSTICE.

The Petition for Appeal for the defendant was denied pursuant to Rule 5A:18 of the Rules of the Supreme Court of Virginia. The defendant asks for consideration of the Petition on the ground that the case should be heard under the exceptions of "good cause" and the "ends of justice" pursuant to Rule 5:25. In order to "attain the ends of justice" the Court may apply the rule and where the requirements of the rule alone stand in the way of reaching the alleged error. see ***Saunders V. Commonwealth***, 211 Va. 399, 177 S.E.2d 637 (1970).

The Commonwealth made no objections regarding the preservation of the question of the sufficiency of the evidence and defense counsel did in fact move to strike the evidence presented by the Commonwealth and to set aside the verdict on the ground that the Commonwealth had not presented evidence that the defendant received a copy of the breath certificate as is required by Virginia Code § 18.2-268.2(B). The Commonwealth conceded this fact in their brief to the Supreme Court of Virginia. The Commonwealth consented to the preservation of the evidence and to the fact that the issue is ripe for appeal.

The Court noted the exception to the objection of defense

counsel and would not have done so except that defense counsel properly objected on the ground that the defendant was not given a copy of the breath certificate produced by the breath analyzer.

CONCLUSION

Wherefore in consideration of the foregoing argument, the Petitioner prays this Court find error in the actions of the Virginia Supreme Court in holding that the petitioner did not comply with the terms of Rule 5A:18 of the Supreme Court of Virginia. In a case in which the party advocate, the Commonwealth of Virginia, admitted that the Petitioner had complied with the rule, the petitioner is denied due process and justice demands that the appellate Court of Virginia hear and decide the case. Both parties, the Petitioner and the Respondent, both admitted that trial court defense counsel DID make a Motion to Strike the evidence of the Commonwealth of Virginia and the oversight in including counsels action in the Agreed Statement of Facts should not bar the defendant of the right to have his case heard at the appellate level.

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By Counsel

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JIMMY FITZGERALD,

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v.

COMMONWEALTH OF VIRGINIA,

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APPENDIX

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VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the city of Richmond on Friday *the* 20th *day of* April, 2001.

Jimmie Fitzgerald, Appellant,

against Record No. 002187
Court of Appeals No. 0086-00-3

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 16th day of February, 2001 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,
Teste:
/s/ David B. Beach
Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 16th day *of* February, 2001.

Jimmie Fitzgerald, Appellant,

against Record No. 002187
Court of Appeals No. 0086-00-3

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court dismisses the petition for appeal pursuant to Rule 5:25 (failure to move to strike the evidence).

A Copy,

Teste:
David B. Beach, Clerk

By: /s/
Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Tuesday *the* 8th *day of* August, 2000.

Jimmie Fitzgerald, Appellant,

against Record No. 0086-00-3
Circuit Court No. CR99-1186

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Danville
Before Judge Bumgardner, Senior Judges Duff and Overton

For the reason previously stated in the order entered by this Court on June 21, 2000, the petition for appeal in this case hereby is denied.

This order shall be certified to the trial court.

A Copy,
Teste:
Cynthia L. McCoy, Clerk
By: /s/
Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Tuesday *the* 21st *day of* June, 2000.

Jimmie Fitzgerald, Appellant,

against Record No. 0086-00-3
Circuit Court No. CR99-1186

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Danville
Before Chief Judge Fitzpatrick

This petition for appeal has been reviewed pursuant to Code § 17.1-407(C), recodifying Code § 17-116.05:2(C), and is denied for the following reason:

In his petition for appeal, appellant states the following question presented: "Whether the evidence was sufficient to support a conviction of the defendant for the offense of driving under the influence." The statement of facts filed in the trial court does not indicate that appellant moved to strike the evidence. Nor does it reflect what argument, if any, defense counsel made at the conclusion of the evidence.

In a bench trial, at the conclusion of all the evidence, the defendant must make a motion to strike, present an appropriate argument in summation, or make a motion to set aside the verdict, in order to preserve the question of the sufficiency of the evidence. *See* Howard v. Commonwealth, 21 Va. App. 473,

478, 465 S.E.2d 142, 144 (1995).

Defendant did not preserve the question of the sufficiency of the evidence to support the conviction. Accordingly, Rule 5A:18 bars our consideration of this question on appeal. Moreover, the record does not reflect any reason to invoke the good cause or ends of justice exceptions to Rule 5A:18.[1]

This order is final for purposes of appeal unless, within fourteen days from the date of this order, there are further proceedings pursuant to Code § 17.1-407(D), recodifying Code § 17-116.05:2(D), and Rule 5A:15(a). If appellant files a demand for consideration by a three-judge panel, the demand should include a statement, not to exceed one typewritten page, identifying how this order is in error.

A Copy,

Teste:

/s/ Cynthia L. McCoy

Clerk

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[1] Insofar as appellant's argument on appeal relates to the admissibility of the certificate of analysis, we find no merit in the argument. The statement of facts does not indicate that the equipment used by the officers automatically produced a written printout of the breath test result. Accordingly, the last sentence of Code § 18.2-268.2(B) does not apply.